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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NML CAPITAL, LTD.,

Plaintiff,

v.

THE REPUBLIC OF ARGENTINA,

Defendant.

Case No. C 12-80185 JSW (MEJ)

PLAINTIFF NML CAPITAL, LTD.'S MOTION FOR RELIEF FROM NONDISPOSITIVE ORDER OF MAGISTRATE JUDGE DATED FEBRUARY 21, 2013 (DOCKET # 31)

[Fed. R. Civ. P. 72(a); Local Rule 72-2]

Pursuant to Federal Rule of Civil Procedure 72(a), Northern District of California Civil Local Rule 72-2, and 28 U.S.C. § 636(b)(1)(A), Plaintiff NML Capital, Ltd. ("NML") objects to Magistrate Judge James's Discovery Order (D.E. 31) ("Order") denying NML's motion to compel discovery from Chevron Corporation ("Chevron") and limiting NML's Subpoena to Chevron to exclude information concerning Yacimientos Petroliferos Fiscales S.A. ("YPF"). NML requests that the Court reverse the Order and remand to apply the proper legal standards.

OBJECTION NO. 1:

The Magistrate Judge held at p. 2, lines 7-22 of the Order that "NML's allegations regarding YPF's relationship to the Republic are insufficient as a matter of law to overcome the presumption that YPF is a separate juridicial [sic] entity for purposes of asset discovery on an alter-ego theory" based on the presumption articulated in *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 627 (1983), that "[d]uly-created instrumentalities of a foreign state are to be accorded a presumption of independent status" for purposes of judgment liability. In other words, the Magistrate Judge determined that because NML was unable to establish conclusively at this preliminary stage that YPF—or any other Argentine instrumentality—was the alter ego of Argentina to establish judgment liability, it could not seek discovery from a non-sovereign third party under the Federal Rules to establish that very fact. This heretofore unheard of hurdle for asset discovery defies logic, is plainly erroneous, and is inconsistent with the Magistrate Judge's—and this Court's—prior decisions in this case.

BASIS FOR OBJECTION:

The Magistrate Judge erroneously conflated the standard for establishing ***the merits*** of an alter ego claim aimed at a sovereign instrumentality (when a sovereign's creditor hauls an alleged alter ego into court under the Federal Sovereign Immunities Act ("FSIA")) with the standard for merely seeking ***discovery*** that is likely relevant to the merits of such a claim from a non-sovereign third party. Although a sovereign instrumentality enjoys a presumption of independent status for purposes of ***liability***, and for ***attachment*** efforts aimed at it, *see Bancec*, 462 U.S. 611, 627 (1983), neither the FSIA nor the presumption of independence are even relevant in the context of ***discovery*** when it is sought from a non-sovereign third party. Indeed, the Order cites to no case

that supports its conclusion that NML must overcome the presumption of a sovereign instrumentality's independence for attachment liability purposes in order to obtain discovery from a non-sovereign third party about that instrumentality's relationship with the sovereign.[1]

Both this Court and the Second Circuit have already determined that sovereign immunity has no bearing on discovery issued to a non-sovereign third party. Indeed, in its November 13, 2012 Order (the "November 13 Order"), affirming an earlier decision by the Magistrate Judge, this Court stressed that the FSIA does ***not*** apply to discovery issued to a non-sovereign entity and that there is no need, in such a context, to "protect foreign sovereigns from the burdens of litigation, including the costs and aggravations of discovery." November 13 Order (D.E. 24) at 2; *see also EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 203, 208-10 (2d Cir. 2012). Inexplicably, and in spite of this prior holding, the Magistrate Judge denied the discovery issued to Chevron (a non-sovereign third party) seeking information about a sovereign instrumentality, YPF, by improperly applying the protections that the FSIA and federal common law afford to sovereign instrumentalities. *See* Order at 3. The Order makes no effort to harmonize the conflicting holdings—that sovereign immunity does not apply to limit post-judgment discovery sought from non-sovereign third parties, but that the presumption of separateness afforded to sovereign instrumentalities somehow does apply when that discovery involves purported alter egos of a sovereign. That is because it cannot.

The reasoning of *EM* and this Court's November 13 Order instruct that when discovery issued to a non-sovereign merely seeks information ***about*** a sovereign instrumentality, whatever legal protections that instrumentality enjoys by virtue of its sovereign status have no bearing. In

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[1] The cases cited in the Order did not involve discovery at all, let alone discovery of a non-sovereign third party, as to which the FSIA does not apply. Rather, the cited cases applied the *Bancec* presumption to determine whether ***attachment*** of sovereign instrumentalities under the FSIA was proper, which is not at issue here. *See Pravin Banker Associates, Ltd. v. Banco Popular del Peru*, 9 F. Supp. 2d 300, 305 (S.D.N.Y. 1998) (holding judgment creditor of Peruvian instrumentality had not met *Bancec's* test for an alter ego determination in an ***attachment*** proceeding); *LNC Investments, Inc. v. Republic of Nicaragua*, 115 F. Supp. 2d 358 (S.D.N.Y. 2000) (applying *Bancec* presumption of independence before allowing ***attachment*** of sovereign instrumentality's assets).

that context, the question is not whether the plaintiff can ***establish*** (prior to discovery) an alter ego allegation, but rather is, under the broad scope of post-judgment discovery afforded under the Federal Rules of Civil Procedure, whether the information sought is relevant and not unduly burdensome. *See Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1073-74 (9th Cir. 2002); *see also* Fed. R. Civ. P. 69(a)(2) (authorizing judgment creditor to "obtain discovery from any person—including the judgment debtor—as provided in these rules"); Fed. R. Civ. P. 26(b)(1) (party may obtain discovery regarding "any matter, not privileged, that is relevant to the claim or defense of any party").[2]

In contrast to the unsupported and erroneous standard set forth in the Order, the appropriate legal procedure governing alter ego discovery involving sovereign instrumentalities has been established in numerous cases. In *Flatow*, the Ninth Circuit affirmed a denial of attachment under *Bancec* only ***after*** the district court had permitted the plaintiff to take discovery of the sovereign instrumentality itself to establish an alter ego relationship with the Iranian government. 308 F.3d at 1068-69, 1074. Moreover, in addressing a dispute over the scope of discovery in that case, the Ninth Circuit did not apply the FSIA or the *Bancec* presumption, but instead weighed the relevance of the discovery against its burden under Federal Rule 26—just as in any discovery dispute. *Id*. at 1074-75. The Order turns the procedure endorsed by the Ninth Circuit in *Flatow* on its head and is reversible on that ground alone. Similarly, in *Magnaleasing, Inc. v. Staten Island Mall*, the court held that discovery should be permitted under the Rules when "the relationship between the judgment debtor and the non-party is ***sufficient to raise a reasonable doubt***" about whether the non-party is truly a separate entity. 76 F.R.D. 559, 562 (S.D.N.Y. 1977) (emphasis added). *See also Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 412-14 (5th Cir. 2004) (recognizing propriety of effort "to discover facts that would support a finding of alter ego" and upholding sanctions against party for resisting such

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[2] *See also EM*, 695 F.3d at 204 (enforcing subpoenas that defined "'Argentina' broadly to include Argentina's 'agencies, ministries, instrumentalities, political subdivisions [and] employees'"—without considering whether such entities were Argentina's alter egos).

discovery); *Strick Corporation v. Thai Teak Products Company*, 493 F. Supp. 1210, 1217 (E.D. Pa. 1980) (judgment creditor must make "***some showing*** of the relationship that exists between the judgment debtor and the third party" to obtain alter ego discovery) (emphasis added). This liberal standard is a far cry from that improperly imposed by the Order, which requires NML to rebut a heavy presumption of independence before it has access to any facts to do so.

Finally, the Order overlooks the fact that discovery concerning YPF is relevant even if YPF were never found to be Argentina's alter ego. YPF has been expropriated from its private owners by Argentina in order to carry out the Republic's energy policy goals and to develop its vast state energy resources. As NML learns more about Chevron's work with YPF, it will increase its overall understanding of how Argentina's energy sector operates, what ministries and entities control its assets, and how energy products are developed and sold—all of which eventually may lead to the discovery of attachable Argentine property. That is true even if NML never establishes that YPF is Argentina's alter ego and thus able to attach YPF's assets themselves. This is consistent with "the freedom to make a broad inquiry" that judgment creditors, such as NML, are permitted to have under the Federal Rules. *Ryan Inv. Corp. v. Pedregal de Cabo San Lucas*, No. C 06-3219 JW (RS), 2009 WL 5114077, at *1 (N.D. Cal. Dec. 18, 2009).

OBJECTION NO. 2:

The Magistrate Judge held at p. 2, lines 17-20, that "the scope of discovery that may be obtained from third parties by a judgment creditor is limited to that necessary for 'the purposes of discovering any concealed or fraudulently transferred assets' of the judgment debtor. *Magnaleasing*, [76 F.R.D. at 561]." To the extent the Magistrate Judge ruled that a judgment creditor cannot obtain discovery about an alleged alter ego's transactions and relationships with a judgment debtor and can only discover information about actual asset transfers, the decision both misconstrues the holding of *Magnaleasing* and is contrary to law.

BASIS FOR OBJECTION:

The Magistrate Judge erred in relying on a 1977 Southern District of New York decision—rather than the recent, contrary Second Circuit opinion in *EM* that necessarily

controls—for the suggestion that post-judgment discovery from a third party "is limited to that necessary for 'the purpose of discovering any concealed or fraudulently transferred assets' of the judgment debtor." Order at 2.[3] In making that statement, the court misconstrued *Magnaleasing*, but regardless, *EM* made it perfectly clear that post-judgment discovery is not so limited. In *EM*, which arose in the exact same factual context as the issue before this Court, the Second Circuit endorsed NML's taking of discovery from a third party concerning Argentina's assets ***and*** its activities in capital markets. *EM*, 695 F.3d at 203 (noting that the underlying discovery upheld aimed to learn information from third parties not only about Argentina's actual assets but also "to gain an understanding of Argentina's 'financial circulatory system.'"). Further, the subpoenas that the Second Circuit allowed to go forward in *EM* "define[d] 'Argentina' broadly to include Argentina's 'agencies, ministries, instrumentalities, political subdivisions [and] employees'" without any limitation depending on whether the entities were Argentina's alter egos. *Id.* at 204.

Just as it was relevant to NML's post-judgment enforcement efforts to inquire into both Argentina's assets and its activities in the capital markets (including those of its "agencies, ministries, instrumentalities, political subdivisions [and] employees")—discovery that was endorsed by the Second Circuit in *EM*—it is relevant for NML to seek information concerning assets and activities of Argentina (including YPF and other agencies, instrumentalities, and political subdivisions) in the hydrocarbon market.

Respectfully submitted,

Dated: March 7, 2013

DECHERT LLP

By: */s/ Joshua D. N. Hess*
Joshua D. N. Hess
Dennis H. Hranitzky

Attorneys for Plaintiff
NML Capital, Ltd.

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[3] In its November 13 Order (D.E. 24) the Court relied extensively on the Second Circuit's decision in *EM*.